

U.S. v. Hernandez, No. 04-50513
Rawlinson, Circuit Judge, dissenting:

SEP 26 2005

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

I respectfully dissent. I disagree with the majority's conclusion that the officer "had an insufficient basis for a *Terry* stop."

It is undisputed that when the officer approached, Rogelio Hernandez exited his vehicle, exhibited nervousness, and walked toward the officer while asking, "What is going on?" At that point, the officer either asked or directed Hernandez to return to his vehicle. Because the record is unclear on this point, the majority opinion cites *Florida v. Royer*, 460 U.S. 491, 497 (1983) to support its conclusion that Hernandez was seized when he returned to his vehicle. However, as the majority opinion acknowledges parenthetically, the issue in *Royer* was whether consent to a search was voluntary. *Id.* at 496-97. Significantly, in *Royer* the seizure occurred before consent to search was requested. *See id.* at 494. However, this case is more akin to cases where pedestrians were directed to a particular location to ensure officer safety. *See United States v. Summer*, 268 F.3d 683, 687 (9th Cir. 2001) (analogizing an individual in a parked car to a pedestrian). In such a circumstance, direction given in the interest of maximizing officer safety does not implicate the Fourth Amendment. *See e.g., United States v. Crespo do Llano*, 838 F.2d 1006, 1016 (9th Cir. 1988), *as amended*, (concluding that no seizure

occurred when homeowner was asked to remain outside her home while officers obtained a warrant).

In any event, any requirement of reasonable suspicion was met in this case. Hernandez was parked late at night, at the portion of a convenience store that was closed, in an area notorious for drug activity. These facts, when combined with Hernandez's hasty and nervous exit from the vehicle supported a reasonable suspicion that criminal activity was afoot. *See Haynie v. County of Los Angeles*, 339 F.3d 1071, 1075-76 (9th Cir. 2003); *see also United States v. Diaz-Juarez*, 299 F.3d 1138, 1142 (acknowledging the late hour and high-crime location as pertinent factors in determining whether reasonable suspicion exists). We should be extremely hesitant to second-guess safety determinations made by officers in the field. As we recently acknowledged in *United States v. Williams*, No. 04-10213, slip op. at 10773 (9th Cir. Aug. 16, 2005):

In the final calculus, we think it best left to the discretion of the officers in the field who confront myriad circumstances we can only begin to imagine from the relative safety of our chambers.

Because I do not think it appropriate to second-guess the officer's field determination regarding safety concerns, I would affirm the district court's denial of Hernandez's motion to suppress.